

Exhibit 58

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1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 JACKIE FITZHENRY-RUSSELL, §
4 ROBIN DALE, and GEGHAM §
5 MARGARYAN, as individuals, §
6 on behalf of themselves, §
7 the general public and §
8 those similarly situated, §

§ Case Nos. 5:17-cv-00564-NC
§ (lead); 5:17-02341-NC
§ (consolidated);
§ 5:17-cv-04435-NC
§ (consolidated)

9 Plaintiffs,

10 vs.

11 DR. PEPPER SNAPPLE GROUP,
12 INC., DR. PEPPER/SEVEN UP,
13 INC. and DOES 1-50,

14 Defendants.

15 *****

16 ORAL DEPOSITION OF

17 KEITH R. UGONE

18 MAY 24, 2018

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1 ORAL DEPOSITION OF KEITH R. UGONE, produced as a
2 witness at the instance of the Plaintiffs and duly
3 sworn, was taken in the above-styled and numbered cause
4 on the 24th day of May, 2018, from 9:07 a.m. to
5 5:06 p.m., before Jamie Prince Hess, Certified Shorthand
6 Reporter in and for the State of Texas, reported by
7 computerized stenotype machine at Baker Botts LLP, 2001
8 Ross Avenue, Suite 900, Dallas, Texas 75201, pursuant
9 to the Federal Rules of Civil Procedure and the
10 provisions stated on the record or attached hereto.

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1 A P P E A R A N C E S
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3 FOR THE PLAINTIFFS:

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P R O C E E D I N G S

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KEITH R. UGONE,

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having been first duly sworn, testified as follows:

4

EXAMINATION

5

BY MR. GUTRIDE:

6

Q. Good morning, Dr. Ugone.

7

A. Good morning.

8

Q. It's nice to see you again.

9

A. Same here.

10

MR. GUTRIDE: Can you mark this
Exhibit 400, please.

12

(Exhibit No. 400 marked.)

13

Q. Dr. Ugone, you have reviewed Dr. Mike Dennis'
report in this case?

15

A. Yes.

16

Q. And you understand he conducted a conjoint
analysis?

18

A. Yes.

19

Q. What's a conjoint analysis?

20

21

A. It's a survey technique where you give
individuals choice sets to choose from and you give them
a series of choice sets and it has attributes and prices
and ultimately from that analysis you try to tease out a
value the consumer may put on a certain type of
attribute associated with the product. That would be a

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1 so it's a question of what you then do with the results
2 of the conjoint analysis to get you to a price premium,
3 among other things.

4 Q. What do you mean by "willingness to pay"?

5 A. The way I think about it is, you know, in
6 Texas we can have 30 degrees -- 30 days of 100-degree
7 weather and you're walking down the street and it's
8 really hot. It's 100 degrees again and you want a
9 bottle of water and you're willing to pay \$5 for that
10 bottle of water, but because of various competition in
11 the marketplace and alternatives, you only have to pay a
12 dollar for the bottle of water.

13 So the way I think of the willingness to pay
14 is that sort of willingness to pay versus what the
15 market would require you to pay, and those can be very
16 different. So allow me to go a little bit further here.

17 Generally it's true -- this is going to get
18 complicated, but except for the very last customer in
19 the marketplace, willingness to pay generally is always
20 above the market price or what you have to pay. If you
21 think about it, if willingness to pay isn't greater than
22 the market price, then you'd never buy the product, or
23 if willingness to pay was lower than the marketplace,
24 you wouldn't buy the product. So as long as -- without
25 getting too fancy about it, as long as the utility you

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1 derive out of obtaining and consuming the good is
2 greater than the price you have to pay, then you --
3 subject to a budget constraint and other complicated
4 calculations, but you buy the product.

5 Q. Okay. So if we're looking historically at
6 purchases that have been made, an economist would opine
7 that all the purchasers except perhaps the very last one
8 had a willingness to pay that was higher than the market
9 price, correct?

10 A. I think economists would generally say that,
11 yes. In the aggregate, that's called consumer surplus.

12 Q. Okay. And when you used willingness to pay in
13 your declaration and earlier today in your testimony,
14 you were using the definition that you just gave; is
15 that correct?

16 A. Yes.

17 Q. Earlier you said that conjoint analysis
18 measures willingness to pay.

19 A. Yes.

20 Q. So did you mean that a conjoint analysis is
21 measuring what you just described, the person who's
22 walking down the street and is sweating and needs a
23 bottle of water, how much they're willing to pay?

24 A. Yeah. We can talk about different attributes
25 and so forth; but, yes, I think I would say generally

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1 A. Phraseology, correct.

2 Q. When you say "price premium," what do you
3 mean?

4 A. So price premium -- sometimes I even use
5 different words because price premium may have a
6 connotation associated with it, but I think whether you
7 call it a price premium or a price difference -- in
8 other words, if a measure of damages is -- let's just
9 think of price paid versus value received, and if you
10 define value received, what the price of the product
11 would be without a particular attribute. So in a very
12 stringent sort of test you have a product with an
13 attribute, the product without the attribute, and in a
14 market-based analysis you'd be looking at what is the
15 difference in prices of those two products, which is
16 very different from what is the difference in consumers'
17 willingness to pay for those two products, because as we
18 went through our example, for the purchases that are
19 made, willingness to pay, except for that marginal
20 consumer, will always be above what the price is or you
21 wouldn't buy the product, but the difference is what's
22 the price of the product with the attribute, what's
23 price of the product without the attribute, and a price
24 premium, which can also just be called a price
25 difference, without putting any connotation on it, the

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1 price difference is that difference between those two
2 prices with and without the attribute.

3 Q. I'm going to show you Exhibits 214 and 215.
4 Have you seen these before?

5 A. I believe I have, yes.

6 Q. These are screen prints from the market
7 simulator that Dr. Dennis ran on the data that he had
8 obtained from the conjoint survey, correct?

9 A. Correct.

10 Q. And did you also run a market simulation on
11 the data that Dr. Dennis had attained?

12 A. I think we had his simulator, but it's not
13 anything I'm giving any opinions on, so I'm not
14 really -- I think we might have tried to duplicate his
15 results and things like that, but it's not -- like I
16 said, I'm looking at everything from the damages and
17 economic perspective, not the survey-type approach. So,
18 yes, I think we ran just a duplicate of his results, but
19 it's nothing that I'm giving an opinion on.

20 Q. Just so I understand, you personally don't
21 remember sitting down at the computer and looking at the
22 simulator to see, you know, if you change something what
23 happens or anything like that?

24 A. I mean, I can't speak to -- I did not
25 personally, no.

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1 he obtained when looking at all of those different
2 options. You're going to accept that for now, correct?

3 A. I will accept that as an assumption you're
4 asking me to make.

5 Q. Right. And, in fact, that lowest percentage
6 difference occurred at this price bullet point that we
7 have in front of us on Exhibit 214, which is \$3. Will
8 you accept that as well for now?

9 MS. SMITH: Objection. Form.

10 Q. Will you accept that I am -- I just want you
11 to accept that as a predicate for the question I'm about
12 to ask you.

13 A. Yeah. Whether there's a predicate or a
14 hypothetical or whatever, asking me to make that
15 assumption.

16 Q. Okay. Thank you.

17 Now, assuming that at this price point, at \$3,
18 you end up with a 14-cent price difference which is what
19 leads to the 4.67 percent that Dr. Dennis computed, are
20 you testifying that the 14 cents is the willingness to
21 pay at this price point, at \$3, for the made from real
22 ginger attribute?

23 A. That would be my interpretation of what
24 Dr. Dennis has presented, yes. Actually, give me one
25 second. I want to look here at one thing.

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1 Okay. I was just looking at the full
2 information that was on the sheet; but, yes, we can go
3 forward.

4 Q. When you say that, yes, that is your
5 understanding, are you saying it's your understanding
6 that it's the willingness to pay of whom, of the average
7 person, the marginal person, or some other thing?

8 A. Yeah, I think the literature would say it's
9 the marginal person.

10 Q. And what's the marginal person mean?

11 A. The very last consumer.

12 Q. Meaning the one that we were talking about
13 earlier who is at the -- the one whose willingness to
14 pay is closest to the market price?

15 A. Yeah, although this marginal customer, I
16 think, allows the share of preferences to be equal,
17 because there is no supply curve here, but I think it's
18 generally viewed as -- and I'm not going to debate
19 this -- viewed as more of the marginal customer.

20 Q. Okay. Thank you.

21 Given that the 14 cents in the context of the
22 \$3 price point is the willingness to pay of the marginal
23 consumer, why is it your testimony that 4.67 percent is
24 a measurement of willingness to pay?

25 A. Because the 14 cents is the willingness to

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1 Q. What was the result?

2 A. The court agreed with me.

3 Q. So I imagine they were pleased with your
4 service?

5 A. They may have been. Actually, I never asked
6 the direct question.

7 Q. Have you ever worked with Dr. Befurt before?

8 A. No.

9 MR. GUTRIDE: Let's take a break.

10 (Recess taken from 4:59 to 5:06 p.m.)

11 MR. GUTRIDE: I have no further
12 questions.

13 MS. SMITH: I have no questions.

14 (Deposition concluded at 5:06 p.m.;
15 signature waived.)

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1 UNITED STATES DISTRICT COURT
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3 JACKIE FITZHENRY-RUSSELL, §
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12 INC., DR. PEPPER/SEVEN UP, §
13 INC. and DOES 1-50, §

14 Defendants.

15 REPORTER'S CERTIFICATION
16 ORAL DEPOSITION OF
17 KEITH R. UGONE
18 MAY 24, 2018
19 CONFIDENTIAL - ATTORNEYS' EYES ONLY

20 I, Jamie Prince Hess, Certified Shorthand
21 Reporter in and for the State of Texas, hereby certify
22 to the following:

23 That the witness, KEITH R. UGONE, was
24 duly sworn by the officer and that the transcript of the
25 oral deposition is a true record of the testimony given
 by the witness;

26 I further certify that pursuant to FRCP
27 Rule 30(f)(1) that the signature of the deponent:

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1 _____ was requested by the deponent or a
2 party before the completion of the deposition and is to
3 be returned within 30 days from date of receipt of the
4 transcript. If returned, the attached Changes and
5 Signature page contains any changes and the reasons
6 therefor;

7 ____X____ was not requested by the deponent
8 or a party before the completion of the deposition.

9 That the amount of time used by each
10 party at the time of the deposition is as follows:

11 Mr. Adam J. Gutride - (06:16)
12 Ms. Monica H. Smith - (00:00)
12 Ms. Jessica Underwood - (00:00)

14 I further certify that I am neither
15 counsel for, related to, nor employed by any of the
16 parties in the action in which this proceeding was
17 taken, and further that I am not financially or
18 otherwise interested in the outcome of this action.

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1 Certified to by me on this _____ day
2 of _____, 2018.
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JAMIE PRINCE HESS, TEXAS CSR #6761
Expiration Date: 12/31/18
CONTINENTAL COURT REPORTERS, INC.
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